## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinion of the Circuit Court of Appeals, not yet officially reported, is at R. 17. The opinion of the District Court is at R. 5. As stated in the petition submitted herewith, the jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C. A. § 347(a)].

### Specification of Error

The Circuit Court of Appeals erred in reversing the judgment of the District Court and in failing to affirm the same.

### Statute and Constitutional Provisions Involved

The Rules of Decision Act (Judiciary Act of 1789, c. 20, § 34, 28 U. S. C., § 725) provides:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The Constitution of the State of New York, Article I, Section 8, provides:

> "§ 8. [*Freedom of speech and press; criminal prosecutions for libel.*]
>
> "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments

> for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

In addition, the First and Fourteenth Amendments to the Constitution of the United States are deemed pertinent.

## ARGUMENT

### I

**The Circuit Court of Appeals has decided an important question of local law in a way to be deemed in conflict with applicable local decisions.**

Under the decisional law of the State of New York, words claimed to be defamatory are to be given a fair reading; they are to be construed as persons generally understand them and according to their ordinary meaning; and where the words are plain and unambiguous on their face, the question of libel or no libel presents a question of law for Court determination (See *Moore* v. *Francis, et al.*, 121 N. Y. 199, 202-203; *Morrison* v. *Smith*, 177 N. Y. 366, 368-369; *Cafferty* v. *Southern Tier Publishing Co.*, 226 N. Y. 87, 93; *Hays* v. *American Defense Society*, 252 N. Y. 266, 270; *Balabanoff* v. *Hearst Consolidated Publications*, 294 N. Y. 351, 356).

The Court below, in construing the matter complained of herein, did not follow these general rules of construction. The Court read into the alleged libel things which were not there; and the construction which the Court held a jury might place on the alleged libelous words is obviously strained and presses the words out of their ordinary sense and meaning.

Indeed, not even the plaintiff in his complaint claimed that the words accused him of being a member of the Communist Party or in general sympathy with its objects and methods. The sole innuendo pleaded in the complaint was that the words in question charged that "plaintiff, an attorney representing labor organizations, had represented the Communist Party of the State of Massachusetts in the official capacity of legislative agent before the General Court of Massachusetts" (R. 3). The fact that the plaintiff, in an effort to spell out a defamatory meaning, found it necessary to plead such an innuendo and to allege as an extrinsic fact that he was an attorney, was sufficient reason in itself for holding that the words complained of were not actionable without allegation and proof of special damage.

As stated by the New York Appellate Division, First Judicial Department, in *Keene* v. *Tribune Association,* 76 Hun. (N. Y.) 488, at 490:

> " * * * There is no question that 'whatever words have a tendency to hurt, or bring ridicule and contempt on the plaintiff, or are calculated to prejudice a man who seeks his livelihood by any trade or business are actionable. When proved to have been spoken in relation thereto, the action is supported, and unless the defendant shows a lawful excuse, the plaintiff is entitled to recover without allegation or proof of special damage, because both the falsity of the words and the resulting damage are presumed.' (*Moore* v. *Francis,* 121 N. Y. 204.) But the difficulty with the plaintiff's case is that there is nothing in the article which shows that any part of the publication was made in respect to any trade or business in which the plaintiff was engaged. Where such is the case an innuendo cannot change or enlarge the plain meaning of words, and it is not enough that the language tends to injure the person in his office, profession or trade, but it must be proven to have been spoken in relation thereto. (*Moore* v. *Francis, supra.*) As was said in *Kinney* v. *Nash* (3 N. Y. 177), it must touch him in his office, profession or trade."

See also, in this connection, *O'Connell* v. *Press Publishing Co.*, 214 N. Y. 352; *Groggins* v. *Daily Mirror, Inc.*, 268 N. Y. 529; *Kuhn* v. *Veloz*, 252 App. Div. 515; *Weidberg* v. *LaGuardia*, 170 Misc. 374; and *Pottish* v. *Long Island Daily Press Pub. Co., Inc.*, unofficially reported in 103 N. Y. Law Journal (February 21, 1940) at page 823.

In addition to its failure to give effect to the well-established New York rule enunciated by the *Keene* case, *supra*, the Court below also went counter to New York precedents in holding that the actionability of alleged libelous words does not necessarily depend upon the reaction of "right-thinking" persons. While it may be accepted as true that in New York, as elsewhere, the "interest at stake in all defamation is concededly the reputation of the person assailed" (R. 18), no New York case has ever held or suggested, as did the Court below, that "any moral obliquity in the opinions of those in whose minds the words might lessen that reputation, would normally be relevant in mitigation of damages" (R. 18), or that words may be actionable *per se*, regardless of the reaction of "right-thinking" persons, if there be some "wrong-thinking" persons who would regard the plaintiff with scorn, aversion or hostility by reason of the defendant's publication.

In the first place, substantial compensatory damages "must be founded upon a finding of substantial injury" (*Abell* v. *Cornwall Industrial Corporation*, 241 N. Y. 327, 335); and the only matter relevant on the question of mitigation of damages in a libel action in New York is the defendant's good faith in publishing the alleged libel (See *Fleckenstein* v. *Friedman*, 266 N. Y. 19).

Secondly, it has never been and is not now the law of New York that liability for libel is or may be dependent upon how "wrong-thinking" persons think or may feel. The fundamental principles of the New York law of libel, and the test to be applied in determining whether written or printed words are actionable *per se*, were succinctly stated by the New York Court of Appeals, per Crouch, J.,

in *Kimmerle* v. *New York Evening Journal, Inc.*, 262 N. Y. 99, as follows (262 N. Y. at page 102):

> "The law of defamation is concerned only with injuries to one's reputation. Except to the limited extent provided by statute (Civil Rights Law [Cons. Laws, ch. 6], §50), there is no right of privacy. (*Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538) Written words, the effect of which is to invade privacy and to bring undesired notoriety, are without remedy, unless they also appreciably affect reputation. This is the domain, not of positive law, but of obedience to the unenforceable. ("Law and Manners" by Lord Moulton, Vol. 134 The Atlantic Monthly [July, 1924], 1.) From such harms one is protected only by the code of common decency.
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> "Reputation is said in a general way to be injured by words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society. (*Sydney* v. *Macfadden Newspaper Pub. Corp.*, 242 N. Y. 208.)
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> "We shall assume, although it is not alleged, that wide-spread notoriety came to the plaintiff from the publication in question and that she suffered greatly as a result. But there must be something more than that to make it libelous. Considered and weighed 'in the minds of right-thinking persons' (*Sydney* v. *Macfadden Newspaper Pub. Corp., supra*), or as elsewhere expressed, 'in the minds of ordinary, just and reasonable citizens' (*Mycroft* v. *Sleight*, [1921] 90 L. J. K. B. 883, 37 Times Law Rep. 646, 648), do the words published by defendant tend to expose plaintiff to any of the evil results catalogued in the general statement above? * * *"

The foregoing principles, which were held to be basic New York law by the Court below in *Sweeny* v. *Schenectady Union Publishing Company*, 122 Fed. (2d) 288, 290, have been reiterated by the New York Courts time and again;

and these principles were not in any way overruled or qualified by the later decision of the New York Court of Appeals in the case of *Katapodis* v. *Brooklyn Spectator, Inc.*, 287 N. Y. 17, as the Court below assumed in its opinion of reversal herein. The majority opinion of the then Judge Loughran in the *Katapodis* case not only recognized the *Kimmerle* case as authoritative; but the decision in the *Katapodis* case, holding actionable *per se* a newspaper article which wrote up the plaintiff parents of a deceased child as objects of pity and in such a way as might tend to "deprive them of friendly association with a considerable number of respectable members of their community" (287 N. Y. 17, 21), is plainly consistent with the prior decision of the New York Court of Appeals in the *Kimmerle* case, and has been so regarded by subsequent New York cases (See *Balabanoff* v. *Hearst Consolidated Publications*, 294 N. Y. 351, 356; *Neaton* v. *Lewis Apparel Stores*, 267 App. Div. 728, 733; *Lubliner* v. *Reinlib*, 184 Misc. 472, 484; *Thomas* v. *Hunt*, unofficially reported in 110 N. Y. Law Journal (November 10, 1945) at page 1265).

Finally, the decision of the Court below, as in the case of the majority decision of the Court below in *Sweeney* v. *Schenectady Union Publishing Company, supra*, is in direct conflict with pertinent New York decisions recognizing the legal right of all citizens, including newspapers and magazine publishers, to criticize and comment freely upon political matters and other matters of public concern (See *Hamilton* v. *Eno*, 81 N. Y. 116; *Hoeppner* v. *Dunkirk Printing Co.*, 254 N. Y. 95; *Gardner* v. *Home Life Publications Co.*, 237 App. Div. 200; *Duffy* v. *New York Evening Post Co.*, 109 App. Div. 471; *Tanzer* v. *Crowley Publishing Corp.*, 240 App. Div. 203; *Hall* v. *Binghamton Press Co.*, 263 App. Div. 403; *Luotto* v. *Field*, 49 N. Y. Supp. (2d) 785, modified and affirmed 268 App. Div. 227, reversed on procedural ground and order of the Special Term affirmed 294 N. Y. 460; *Garriga* v. *Richfield*, 174 Misc. 315).

The case of *Boudin* v. *Tishman*, 264 App. Div. 842, which the Court below regarded as a conclusive and an

"unescapable ruling" in its opinion of reversal herein (R. 20), is clearly distinguishable from the case at bar. In that case, the alleged libel consisted of a letter written by the defendant to a third person in October, 1941, asserting that the plaintiff was an "admitted communist". The letter did not say that the plaintiff was a member of, or had acted on behalf of, a Communist Party having legal status in a particular State of the Union. Moreover, the alleged libelous letter in *Boudin* v. *Tishman, supra,* expressly referred to the plaintiff as "an attorney for the fur industry" and the plain import of the letter was that the plaintiff was not only an "admitted communist", but was a member of a communist organization engaged in subversive activities against the United States of America. No discussion or citation of authority is required to show that such a letter, which was tantamount to a charge of treason, or at the very least, sedition, is actionable *per se;* and it is not surprising, therefore, to find that the New York Appellate Division, First Judicial Department, in affirming the lower Court's order sustaining the legal sufficiency of the complaint, did so without opinion.

Likewise, the case of *Levy* v. *Gelber,* 175 Misc. 746, also referred to in the opinion of the Court below (R. 20), is not in point. There, the alleged libel was in the form of an open letter sent to members of a labor union; the letter, in addition to charging that the plaintiff attorney was a Nazi and a Communist, also charged that he had exacted undue and excessive fees; that he had split these fees with a layman, and that he had been disloyal to the best interests of his client. It is also to be noted that the decision in *Levy* v. *Gelber, supra,* was handed down in January, 1941, while the Hitler-Stalin Peace Pact was still in existence, and that Mr. Justice Hofstadter expressly stated in his opinion denying the defendant's motion to dismiss the complaint, that: "The *current* effect of these statements is the decisive test" (175 Misc. 746, 747). Manifestly, if such a test is to be applied, it is anomalous, to say the least, particularly in view of our present relations with Soviet Russia and the

professions of the Atlantic Charter, Dumbarton Oaks, the San Francisco Conference, and the Potsdam Declaration, for any Court in this country to hold that a reference to a person as "a legislative representative for the Massachusetts Communist Party" in the course of a magazine article on American politics published in the summer of 1944, during a political campaign of first importance, constitutes an actionable libel.

The answer to the primary question presented by the case at bar, it is submitted, is plainly suggested by Mr. Justice Pecora's opinion in *Garriga* v. *Richfield*, 174 Misc. 315, holding that it is not an actionable libel in New York to publish of a person that he is affiliated with or a member of the Communist Party. After referring to the political structure of the Communist Party, Mr. Justice Pecora said (174 Misc. 315, 320-321):

> "The fact remains, however, that the Communist party under existing law, may function as a political party. It may place upon our ballots its candidates for public office—even for the highest in the land—and seek popular support for them. It may, like any other established political party, proclaim its principles and invite public approval of them. At least while it possesses that status and those rights, it cannot be held that it is defamatory *per se* to say of one that he is affiliated with, or a member of, the Communist party, any more than it would be to say that he is a member of any other legally recognized political party. Any rule to the contrary would abridge that freedom of discussion relative to parties, principles and personalities in the political arena, which is so vital to the preservation of our democracy. To deprive our citizens of the right freely to debate political issues, or to allude to the political affiliations of others, is to make a breach in the dike which protects our cherished institutions. Far better it is to preserve that right unhampered—even with the abuses which frequently attend its exercise in the heat of political passion—than to limit it at the possible loss of our constitutional liberties. That right would be restricted at the expense of good

government if, for instance, in a community where a political party had fallen into disrepute on account of evil practices, one could be held generally liable in damages to another for saying of him that he is affiliated with, or a member of, that party.

"A further necessity for this rule is, that in many sections of the country—as is well known—a political party may be held in low esteem, because of prejudice, tradition or other equally unworthy reason, so that membership therein may expose one to contempt, hatred or ridicule; whereas in other sections the same political party may enjoy public favor and confidence. Should we, in the former situation, subject a person to liability for general damages for referring to another as a member of the despised party? The question itself echoes a negative answer."

To the same effect is the opinion of Mr. Justice Hooley, sitting at a Special Term of the Supreme Court of the State of New York, New York County, in *Luotto* v. *Field*, 49 N. Y. Supp. (2d) 785, modified and affirmed, 268 App. Div. 227, order of Appellate Division reversed on procedural ground and order of Special Term affirmed, 294 N. Y. 460. Although the New York Court of Appeals' decision of reversal dealt solely with a question of procedure, and the Court of Appeals expressed no opinion on the merits, both Mr. Justice Hooley, sitting at Special Term, and the New York Appellate Division, Second Judicial Department, expressly held on the merits that a statement in a newspaper article to the effect that the plaintiff was a "pre-Pearl Harbor Fascist", was not actionable *per se*. In so holding, Mr. Justice Hooley said (49 N. Y. Supp. (2d) 785, 788):

"* * * Prior to the entry of the United States into World War II it was not libelous per se to describe a man as a fascist. Up to that time it cannot be said that a man who held the political beliefs of fascism was a person who by reason thereof was exposed to public contempt, ridicule, hatred or dis-

> grace. True he would be out of step with our theory of government and the viewpoint of almost the entire population. It must be remembered that in our own country under our laws it was lawful for a person to run for the office of Governor of the State of New York upon the Communist Party ticket and platform. Americans are inveterate readers of newspapers. They are familiar with European politics. In their own minds they form opinions and carry on discussions as to which party in any country is the better. No rule of law should be established that would bar free discussion concerning politics, whether national or European, or would prevent free discussion concerning parties and ideologies, and that right would be circumscribed if reference to the affiliations of others were adjudged to be libelous per se. * * *"

and the New York Appellate Division, Second Judicial Department, in its *per curiam* opinion of modification and affirmance, said (268 App. Div. 227, 228-229):

> "The court correctly held that the publication of which plaintiff complains was not a libel *per se* insofar as it declared that plaintiff was a 'pre-Pearl Harbor Fascist,' which was all that the publication charged when fairly read. It is our view that the publication does not charge the plaintiff with anything that reflects upon his business skill or credit in his capacity as a manager of a radio station. The publication merely related to plaintiff's political views. The complaint does not allege that at the time of the publication plaintiff was engaged in such a calling or that he was such a manager. It alleges that he was an 'advertising agent' specializing in radio advertising. It is, therefore, insufficient to sustain causes of action for general damages. (*Frederics* v. *Nessler*, 187 App. Div. 590; *Cassavoy* v. *Pattison*, 93 App. Div. 370, 372; *Cafferty* v. *Southern Tier Publishing Co.*, 226 N. Y. 87; *Bank* v. *Goodwin*, 167 Mo. App. 211, 218; *Armstrong* v. *Sun Printing & Publishing Association*, 137 App. Div. 828, 831; *Purdy* v. *The Rochester Printing Co.*, 96 N. Y. 372.) The allegations that he had contract arrangements to become a manager in the event that the transfer

of the radio station was approved are insufficient as a basis for general damages. (33 Am. Jur., Libel & Slander, pp. 81-82, § 63; *Dudley* v. *Briggs,* 141 Mass. 582.)"

Reference may also be made, in this connection, to the opinion of the New York Appellate Division, First Judicial Department, in the case of *Duffy* v. *New York Evening Post Co.,* 109 App. Div. 471, where a newspaper article criticizing a Republican political candidate as—"Absolutely devoid of any knowledge of the customs of polite men. Does well in business, especially during Tammany regimes. Devotes his time and energy more to assisting the Tammany leaders than to working for his own nominal party. Is reported to be about to join Tammany openly soon. Apparently knows no more of and cares no more for political principles than he does of the silurian age in geology. Mixes in Tammany factional fights, to the detriment of the Republican Party. A most unworthy choice."—was held non-actionable in the absence of allegation and proof of special damage.

## II

**The Circuit Court of Appeals has failed to comply with the pronouncements of this Court relative to the ascertainment and application of state law in diversity cases.**

That the Circuit Court of Appeals has failed to comply with the pronouncements of this Court in *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, as amplified by the subsequent decisions of this Court in *Wichita Royalty Co.* v. *City Bank,* 306 U. S. 103; *Fidelity Trust Co.* v. *Field,* 311 U. S. 169; *West* v. *American Telephone & Telegraph Co.,* 311 U. S. 223, will be apparent not only from what has been said under the first point of this brief (pages 12-18, *ante*) but from the majority opinion of the Circuit Court of Appeals in *Sweeney* v. *Schenectady Publishing Company,* 122 Fed.

(2d) 288, as well as the dissenting opinion of Circuit Judge Clark in that case.

As pointed out in the petition submitted herewith (at pages 8-10), the majority of the Circuit Court of Appeals in the *Sweeney* case at least recognized and applied the well-established New York rule enunciated by the New York Appellate Division, First Judicial Department, in *Keene* v. *Tribune Association*, 76 Hun (N. Y.) 488, 490, and also recognized and purported to apply the fundamental principles of the New York law of libel as laid down by the New York Court of Appeals in *Kimmerle* v. *New York Evening Journal, Inc.*, 262 N. Y. 99, 102. In the case at bar, the Circuit Court of Appeals deliberately refused to follow its own majority decision in the *Sweeney* case in respect of these two important aspects of the New York law of libel. And, of course, both in this case and in the *Sweeney* case, the Circuit Court of Appeals failed to recognize and apply pertinent New York decisions sustaining the right of any citizen to criticize and comment freely upon political matters and other matters of public concern (See cases cited at page 16, *ante*).

It is not too much to say that the Circuit Court of Appeals in the present case made no fair, accurate, or adequate appraisal or analysis of the New York decisions bearing directly on the question presented. In the face of overwhelming New York authority sustaining the right of free discussion of political matters, and particularly in the face of the decision of Mr. Justice Pecora in *Garriga* v. *Richfield*, 174 Misc. 315, a case almost on all fours with the case at bar, the Circuit Court of Appeals deliberately went out of its way to cite and discuss New York libel cases involving imputations of abject poverty, illegitimacy and insanity, and finally wound up its opinion of reversal by relying upon the wholly inconclusive decision of the New York Appellate Division, First Judicial Department, in

*Boudin* v. *Tishman*, 264 App. Div. 842, which Court merely affirmed without opinion a lower Court's decision denying a motion to dismiss the complaint in a libel action for legal insufficiency where the alleged libelous statements went far beyond the matter claimed to be defamatory herein.

In this latter connection, it is no answer to say that, because the lower Court in *Boudin* v. *Tishman* denied the defendant's motion to dismiss the complaint, citing *Levy* v. *Gelber*, 175 Misc. 746, the affirmance of the lower Court's order without opinion by the Appellate Division in the *Boudin* case was tantamount to an adoption by the Appellate Division of the lower Court's reasoning, or an approval by the Appellate Division of the opinion of the lower Court in *Levy* v. *Gelber*. Apart from the fact that the alleged libels, both in the *Levy* case and in the *Boudin* case, went far beyond anything said in the defendant's article here in question, it is well settled in New York, and the Circuit Court of Appeals should have known, that: "Affirmance without opinion of prior orders made on motions addressed to the pleadings herein was not a ruling that this court adopted the reasoning or the language of the Special Term, but only its conclusion that the case was not to be disposed of on the pleadings but must await trial" (See *Dall* v. *Time, Incorporated*, 252 App. Div. 636, 641; and cases cited).

The case of *Boudin* v. *Tishman* was not, therefore, "an unescapable ruling, although no opinion was written", as the Circuit Court of Appeals stated in its opinion of reversal (R. 20). Neither was it "the last decision of the state courts" or "conclusive" upon the Circuit Court of Appeals in the present case. The decision in *Luotto* v. *Field, supra*, by the New York Appellate Division, Second Judicial Department (a Court of coordinate jurisdiction with the Appellate Division which affirmed without opinion the lower Court's order in *Boudin* v. *Tishman*) was the

latest decision of the New York Courts bearing directly upon the primary question presented by the case at bar; and it is submitted that the Circuit Court of Appeals, in any proper compliance with the rule of *Erie R. R. Co.* v. *Tompkins,* should have followed that decision and affirmed the judgment of the District Court herein.

## III

**The decision below has the effect of circumscribing the rights of freedom of speech and freedom of the press and unduly restricts free discussion of political matters of vital public concern.**

The Constitution of the State of New York, no less than the Constitution of the United States, guarantees freedom of speech and freedom of the press subject to responsibility for the abuse of those rights (see Article 1, Section 8, Constitution of the State of New York, quoted at page 11, *ante*); and while a determination as to the actionability of alleged libelous words ordinarily presents no Constitutional problem, the decision of the Court below, both in its direct holding and in its implications, plainly has the effect of circumscribing the fundamental rights of freedom of speech and freedom of the press and unduly restricts free discussion of political matters of vital public concern.

For all practical purposes, the Constitutional guarantees of freedom of speech and freedom of the press stop where the law of libel and slander begins. If the Court below is correct in its holding that spoken or written words may be actionable by reason of the attitude of "wrong-thinking" persons, and more particularly, that it may be an actionable libel to refer to a man as "a legislative representative for the Massachusetts Communist Party", this Court as the final arbiter of the scope of these Constitutional guarantees should so decide.

The decision of the Court below, in this aspect, is wholly at variance with the New York law. As has previously been shown (at pages 14-16, *ante*), words alleged to be defamatory are actionable *per se* in New York if, and only if, they appreciably affect reputation and, considered and weighed "in the minds of right-thinking persons", or "in the minds of ordinary, just and reasonable citizens", are such as would tend to expose the plaintiff to public hate, contempt and ridicule. Otherwise, the plaintiff in a libel action in New York is not entitled to claim a presumption of general damages. If the alleged defamatory words are false and he was, in fact, harmed by reason of the attitude of "wrong-thinking" persons, he has his legal remedy by alleging and proving the special damages which he has suffered, an opportunity which was accorded to the plaintiff in the case at bar, and refused (R. 7, 12).

It is upon the foregoing basis, entirely consistent with accepted notions of the scope of the Constitutional guarantees of freedom of speech and freedom of the press, that the law of libel and slander has regularly been administered by the New York Courts; and where alleged defamatory words have related to political matters or other matters of public concern, the New York Courts, again with proper regard for the Constitutional guarantees of freedom of speech and freedom of the press, have uniformly recognized the legal right of any citizen to criticise and comment freely upon political matters and other matters of public concern (See cases cited at page 16, *ante*).

It was upon this basis that the District Court granted the defendant's motion to dismiss in the instant case (R. 6); and it is upon the same basis, we submit, that the case should have been decided in the Court below.

## CONCLUSION

In conclusion, therefore, it is respectfully submitted that the petition of The Reader's Digest Association, Inc., for a writ of certiorari herein should, in all respects, be granted.

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